

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Dec 03, 2020**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MATT ROBINS, an individual;  
RONALD VICTOR ARTHUN, an  
individual;

Plaintiffs,

v.

NUVASIVE, INC.; NEXUS  
SURGICAL INNOVATIONS, INC.,  
a Washington State corporation,

Defendant.

NO: 2:20-CV-292-RMP

ORDER DENYING NUVASIVE,  
INC. & NEXUS SURGICAL  
INNOVATION, INC.'S MOTIONS  
FOR PRELIMINARY INJUNCTION

BEFORE THE COURT are motions by NuVasive, Inc. ("NuVasive") and neXus Surgical Innovations, Inc. ("neXus") to enjoin former employees Mr. Matt Robins, ECF No. 14, and Mr. Ronald Arthun, ECF No. 17, from violating the restrictive covenants in their "Confidential Information, Inventions, Nonsolicitation and Noncompetition Agreements" ("Agreement"). These Agreements were entered into by Mr. Robins and Mr. Arthun as a prerequisite to their employment with

1 neXus. *See* ECF Nos. 21-1, 22-1. NuVasive is a third-party beneficiary to the  
2 Agreements. ECF Nos. 21-1 at 7, 22-1 at 7.

3 A hearing was held on this matter on November 24, 2020, at which all parties  
4 were represented, and the entry of a preliminary injunction was contested. Upon  
5 consideration of the attorneys' arguments, record, relevant statutes, and case law, the  
6 Court is fully informed.

7 The Complaint against Mr. Robins is filed in Case No. 2:20-cv-331-RMP,  
8 ECF No. 1, the "Robins Complaint." The Complaint against Mr. Arthun is filed in  
9 Case No. 2:20-cv-342-RMP, ECF No. 1, the "Arthun Complaint."

## 10 **BACKGROUND**

11 NuVasive is a medical device company focused on product development for  
12 the surgical treatment of spinal disorders. Robins Complaint at 2. NuVasive's  
13 products are marketed by exclusive sales agents, such as neXus. *Id.* NeXus had a  
14 sales territory encompassing all or part of Washington, Montana, Utah, Wyoming,  
15 and Idaho. *Id.*

### 16 **Mr. Robins**

17 Mr. Robins was hired by neXus in December 2018 and began working as a  
18 Spine Associate for neXus on January 7, 2019. ECF No. 1-1 at 4. Upon being  
19 offered employment, Mr. Robins received a copy of the "Confidential Information,  
20 Inventions, Nonsolicitation and Noncompetition Agreement." ECF No. 21-1.  
21 NuVasive is a third-party beneficiary of the Agreement. *Id.* at 7. Mr. Robins' initial

1 gross annual salary approximately was \$80,000. Case No. 2:20-cv-331-RMP, ECF  
2 No. 1-1 at 1.

3 On August 5, 2019, Mr. Robins received a promotion to the position of Spine  
4 Specialist. ECF Nos. 1-1 at 5; 22 at 6. After a trial period, Mr. Robins claims his  
5 compensation should have been 100% commission pursuant to the neXus “Standard  
6 Spine Specialist Plan.” ECF No 22 at 10–11. However, as of May 18, 2020, Mr.  
7 Robins still was being paid a regular monthly salary of approximately \$8,333 and  
8 was promised that a formal commission plan would follow in the summer of 2020.  
9 ECF Nos. 25-2 at 7, 42.

10 Mr. Robins resigned from neXus on May 31, 2020, and immediately became  
11 employed in a similar role with a competitor company, Alphatec Spine, Inc.  
12 (“Alphatec”). ECF No. 22 at 2. Mr. Robins is alleged to have immediately solicited  
13 neXus surgeon-customers on behalf of Alphatec. *Id.* On June 4, 2020, Mr. Robins  
14 purportedly supported a surgery, on Alphatec’s behalf, performed by a former  
15 NuVasive/neXus surgeon-customer. *Id.* at 6–7.

16 **Mr. Arthun**

17 Mr. Arthun began working for neXus in April 2018 as a Spine Associate.  
18 ECF No. 1-1 at 6. Upon being offered employment, Mr. Arthun received a copy of  
19 the “Confidential Information, Inventions, Nonsolicitation and Noncompetition  
20 Agreement.” ECF No. 21-1. NuVasive is also named as a third-party beneficiary of  
21 the Agreement between neXus and Mr. Arthun. *Id.* at 7.

1 As a Spine Associate, Mr. Arthun's job was to assist a Spine Specialist in  
2 advising surgeons regarding the use of surgical implants sold by neXus. ECF No. 1-  
3 1 at 6. His initial gross annual salary was \$72,000. Case No. 2:20-cv-342-RMP,  
4 ECF No. 1-3 at 1. In August 2018, Mr. Arthun received a raise and his gross annual  
5 salary increased to \$96,000. ECF No. 1-1 at 7.

6 On December 13, 2019, Mr. Arthun received a promotion to the position of  
7 Spine Specialist. Case No. 2:20-cv-342-RMP, ECF No. 1-3 at 1. As a Spine  
8 Specialist, Mr. Arthun's compensation allegedly was going to be 100% commission  
9 based pursuant to the neXus "Standard Spine Specialist Plan." *Id.* Mr. Arthun was  
10 paid in accordance with the "Standard Spine Specialist Plan" from January 2020 to  
11 his resignation in June. ECF No. 1-1 at 7. Mr. Arthun claims that he earned  
12 commissions of approximately \$56,000 over that six-month period. *Id.*

13 Mr. Arthun resigned from neXus in June of 2020 and became employed in a  
14 similar role with a competitor company, Alphatec. ECF No. 21 at 4. On July 27,  
15 2020, Mr. Arthun allegedly supported surgeries at Bozeman Deaconess performed  
16 by a former NuVasive/neXus surgeon-customer. Arthun Complaint at 10. NuVasive  
17 alleges that Mr. Arthun is soliciting former neXus surgeon-customers in Bozeman,  
18 Montana on behalf of Alphatec. *Id.*

19 / / /

20 / / /

21 / / /

1 **Alphatec**

2 NuVasive contends that the spinal hardware industry is highly competitive.  
3 Robins Complaint at 3. Industry participants entrust their sales representatives, such  
4 as Mr. Robins and Mr. Arthun, with confidential and proprietary information, give  
5 them access to their established customers, and often provide them with proprietary  
6 training. *Id.* Alphatec is one of NuVasive's direct competitors in the spinal  
7 hardware industry. *Id.* at 6. NuVasive claims that it is impossible for Alphatec sales  
8 representatives to perform their job without soliciting existing or potential surgeon-  
9 customers of NuVasive. *Id.* at 6–7.

10 Mr. Robins and Mr. Arthun brought suit against NuVasive and neXus alleging  
11 breach of contract, recovery of unpaid wages, and a declaratory judgment regarding  
12 the Agreements that they entered into with neXus. *See* ECF No. 1-1. NuVasive and  
13 neXus brought suit against Mr. Robins, Case No. 2:20-cv-331-RMP, and against Mr.  
14 Arthun, Case No. 2:20-cv-342-RMP, claiming breach of contract for alleged  
15 violations of the confidentiality, noncompetition, and nonsolicitation obligations set  
16 forth in the Agreements. The cases were consolidated. ECF No. 12. NuVasive and  
17 neXus now move for a preliminary injunction to enjoin Mr. Robins and Mr. Arthun  
18 from violating the restrictive covenants contained in the Agreements. ECF Nos. 14,  
19 17.

20 / / /

21 / / /

## LEGAL STANDARD

Courts may issue preliminary injunctions to prevent immediate and irreparable injury. Fed. R. Civ. P. 65. Case law emphasizes that a preliminary injunction is an “extraordinary and drastic remedy” that may be granted only upon a “clear showing” that the movant is entitled to such relief. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). A party seeking a preliminary injunction must make a “clear showing” that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tip in its favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

In the Ninth Circuit, courts weigh these factors “on a sliding scale, such that where there are only serious questions going to the merits—that is, less than a likelihood of success on the merits—a preliminary injunction may still issue as long as the balance of hardships tips sharply in the plaintiff’s favor and the other two factors are satisfied.” *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018) (internal quotations omitted).

## DISCUSSION

### I. Likelihood of Success on the Merits

As the moving party, NuVasive and neXus must make a “clear showing” that they are likely to succeed on the merits. NuVasive and neXus argue they are likely to succeed on the merits because the restrictive covenants are enforceable, and Mr.

1 Robins and Mr. Arthun will continue to violate the covenants' terms through their  
2 employment with Alphatec. ECF No. 6-1 at 8. Mr. Robins and Mr. Arthun argue  
3 that newly enacted Chapter 49.62 of the Revised Code of Washington precludes  
4 success on the merits because the restrictive covenants do not satisfy the statute's  
5 requirements and are, therefore, unenforceable. ECF No. 19 at 6.

6 Accordingly, the Court turns to (1) whether the restrictive covenants at issue  
7 are enforceable under Washington State law, and (2) if enforceable, whether the  
8 record contains sufficient evidence that Mr. Robins and Mr. Arthun have breached  
9 the restrictive covenants that NuVasive and neXus seek to enforce.

## 10 **1. Enforceability of Restrictive Covenants**

### 11 **A. Noncompetition Covenant**

12 Washington State's new anti-noncompete law, Wash. Rev. Code § 49.62.020,  
13 was enacted based on the legislature's finding that "workforce mobility is important  
14 to economic growth and development." Wash. Rev. Code § 49.62.005. Chapter  
15 49.62 applies retroactively to all cases filed after January 1, 2020, regardless of  
16 when the cause of action accrued. Wash. Rev. Code § 49.62.100. Although the  
17 Agreements at issue were entered into by Mr. Robins and Mr. Arthun prior to  
18 January 1, 2020, the sales representatives' separation from neXus and subsequent  
19 employment occurred after January 1, 2020. All three suits consolidated into the  
20 present action also were commenced after January 1, 2020. Accordingly, Chapter  
21 49.62 applies to this case.

1 Under the new statutory scheme, noncompetition agreements are void and  
2 unenforceable unless they satisfy three statutory requirements. Wash. Rev. Code. §  
3 49.62.010; *see also A Place for Mom v. Perkins*, 2020 WL 4430997 at \*5 (W.D.  
4 Wash. Jul. 31, 2020). First, prior to or when the employee accepts the offer of  
5 employment, the employer must disclose the terms of the noncompete covenant in  
6 writing to the prospective employee, and, if the agreement becomes enforceable only  
7 at a later date due to the changes in the employee's compensation, the employer  
8 must specifically disclose that the agreement may be enforceable against the  
9 employee in the future. Wash. Rev. Code § 49.62.020(1)(a)(i). Second, the  
10 employee's "earnings" must exceed \$100,000. Wash. Rev. Code  
11 § 49.62.020(1)(b). Third, the employee's separation cannot result from being laid  
12 off. Wash. Rev. Code § 49.62.020(1)(c). The parties dispute whether the first  
13 requirement, regarding disclosure as to future enforceability, and the second  
14 requirement, regarding the employee's annual salary, are satisfied.

15 **i. Disclosure**

16 Pursuant to Wash. Rev. Code § 49.62.020(1)(a)(i), the terms of the covenant  
17 must be disclosed in writing no later than when the offer is accepted. If the  
18 agreement becomes enforceable only at a later date due to the changes in the  
19 employee's compensation, the employer also must disclose specifically that the  
20 agreement may be enforceable against the employee in the future. Wash. Rev. Code  
21 § 49.62.020(1)(a)(i). Thus, notice of the terms in writing prior to or upon acceptance



1 of employment is not enough if the employee's compensation initially does not  
2 exceed the earnings threshold. An additional disclosure by the employer to the  
3 employee with respect to future enforceability is required.

4 Mr. Robins and Mr. Arthun received the Agreements, with the noncompete  
5 obligations, upon receiving offers of employment from neXus. ECF Nos. 21 at 2; 22  
6 at 4. Section 4 of both Agreements set forth the following terms comprising the  
7 noncompetition covenant:

8 **4.3** During the Term and for one year after the end of the Term, I  
9 will not engage in, be employed by, perform services for, participate in  
10 the ownership, management, control or operation of, or otherwise be  
11 connected with, either directly or indirectly, any Competing Business.  
12 For purposes of this paragraph, I will not be considered to be connected  
13 with any Competing Business solely on account of: my ownership of  
14 less than five percent of the outstanding capital stock or other equity  
15 interests in any Person carrying on the Competing Business. I agree  
16 that this restriction is reasonable, but further agree that should a court  
17 exercising jurisdiction with respect to this Agreement find any such  
18 restriction invalid or unenforceable due to unreasonableness, either in  
19 period of time, geographical area, or otherwise, then in that event, such  
20 restriction is to be interpreted and enforced to the maximum extent  
21 which such court deems reasonable.

ECF Nos. 21-1 at 4–5 (Arthun); 22-1 at 4–5 (Robins). The Agreements impose  
noncompete obligations for a term of one-year. ECF Nos. 21-1 at 4–5; 22-1 at 4–5.  
There is no dispute that the terms of the covenant were disclosed in writing in a  
timely manner when Mr. Robins and Mr. Arthun initially were offered employment  
with neXus.

1           However, when Mr. Robins and Mr. Arthun entered into the Agreements  
2 neither of their annual earnings exceeded \$100,000. Mr. Arthun had a guaranteed  
3 annual salary of \$72,000. Case No. 2:20-cv-342-RMP, ECF No. 1-3. Mr. Robins  
4 had a guaranteed salary of approximately \$80,000. Case No. 2:20-cv-331-RMP,  
5 ECF No. 1-1. NuVasive and neXus argue that because Chapter 49.62 only became  
6 effective as of January 1, 2020, the obligations at issue were enforceable and binding  
7 on Mr. Robins and Mr. Arthun at the time that they signed their respective  
8 Agreements so no additional disclosure as to future enforceability was required.  
9 ECF No. 25 at 6. However, this argument ignores the plain language of the statute  
10 that the chapter applies to all proceedings commenced on or after January 1, 2020,  
11 regardless of when the cause of action arose. Wash. Rev. Code § 49.62.100. It is  
12 immaterial that the Agreements' terms may have been binding on the sales  
13 representatives prior to the enactment of Chapter 49.62. As of January 1, 2020, such  
14 disclosure was required by law as a predicate to enforcement.

15           Because Mr. Robins' and Mr. Arthun's guaranteed annual income did not  
16 exceed the current earnings threshold of \$100,000 when they were offered  
17 employment, the Agreements only would become enforceable at a later date due to  
18 changes in their compensation. Wash. Rev. Code. § 49.62.020(1)(a)(i). In such a  
19 case, the employer must specifically disclose that the agreement may be enforceable  
20 against the employee in the future. The Agreements at issue do not include such  
21

1 disclosure and there is no evidence of an additional disclosure by NuVasive or  
2 neXus in the record before the Court.

3 There is also no evidence that NuVasive or neXus disclosed the enforceability  
4 of the noncompetition covenant when neXus offered Mr. Robins and Mr. Arthun  
5 their respective promotions to the position of Spine Specialist along with the  
6 associated raise in compensation.

7 Mr. Robins was promoted to the position of Spine Specialist in August of  
8 2019. ECF No. 22 at 6. Mr. Robins maintains that the only Agreement he entered  
9 into was at the outset of his employment in December 2018. *Id.* at 4. The record  
10 does not contain evidence indicating otherwise.

11 Mr. Arthun was promoted to the position of Spine Specialist, effective  
12 January 1, 2020. Case No. 2:20-cv-342-RMP, ECF No. 1-5. When neXus offered  
13 Mr. Arthun the promotion, the offer letter stated that “[a]s a condition of [his]  
14 employment, [he] will be required to sign the enclosed Confidentiality, Non  
15 competition [sic] and Invention Assignment Agreement”. *Id.* However, in the  
16 record before the Court, there is no Agreement enclosed with the offer letter. *Id.*  
17 Furthermore, Mr. Arthun maintains that he did not sign a new Agreement, and the  
18 record does not contain a second executed Agreement between Mr. Arthun and  
19 neXus. ECF No. 21 at 3.

20 Thus, the noncompetition covenant is unenforceable against Mr. Robins and  
21 Mr. Arthun because neXus, as the employer, failed to “specifically disclose that the

1 agreement may be enforceable against the employee in the future,” as required by  
2 Wash. Rev. Code § 49.62.020(1)(a)(i).

3 **ii. Earnings**

4 Even if NuVasive or neXus had made the required disclosures, which the  
5 Court finds no evidence to support, the parties also dispute whether the second  
6 statutory requirement, regarding the employee’s compensation, satisfies the required  
7 \$100,000 benchmark. *See* Wash. Rev. Code § 49.62.020(b).

8 A noncompetition covenant is void and unenforceable “[u]nless the  
9 employee’s earnings from the party seeking enforcement, when annualized, exceed  
10 one hundred thousand dollars per year.” Wash. Rev. Code § 49.62.020(b).

11 “Earnings means the compensation reflected on box one of the employee’s United  
12 States internal revenue service form W-2 that is paid to an employee over the prior  
13 year, or portion thereof for which the employee was employed, annualized and  
14 calculated as of the earlier of the date enforcement of the noncompetition covenant is  
15 sought or the date of separation from employment.” Wash. Rev. Code §  
16 49.62.010(1).

17 NuVasive and neXus argue that the statute contemplates prorating and  
18 annualizing earnings from the date of separation for the remainder of the year; thus  
19 Mr. Robins’ and Mr. Arthun’s projected earnings for the entire year 2020 are  
20 relevant and exceed \$100,000 when annualized. ECF No. 18 at 10. Mr. Robins and  
21 Mr. Arthun contend that the statute calls for a retrospective analysis of the

1 employee's earnings. ECF No. 19 at 6–7. The Court agrees with Mr. Robins and  
2 Mr. Arthun that the analysis for “earnings” is retrospective, as opposed to  
3 prospective, given the plain language of “prior year, or portion thereof” found in the  
4 statutory definition of “earnings.” Wash. Rev. Code § 49.62.010(1).

5 A worker's “earnings” are calculated on the earlier of “the date of separation”  
6 or “the date enforcement of the noncompetition covenant is sought.” *Id.* However,  
7 the calculation looks back to the employee's previous calendar year and uses box  
8 one of the W-2 form. *Id.* For example, if an employee quits on January 2, 2020, the  
9 employee's “earnings,” for the purpose of the statute, are the employee's 2019  
10 earnings. If in the previous year the employee worked only for a portion thereof,  
11 then the earnings are annualized. *Id.*

12 Here, Mr. Robins and Mr. Arthun's relevant “earnings” means the  
13 compensation reflected on box one of their W-2 forms, paid to them over the prior  
14 year. Before 2020, neither Mr. Robins nor Mr. Arthun was paid “earnings” in  
15 excess of \$100,000 during a twelve-month period. ECF Nos. 21 at 3, 25-2 at 7.  
16 Accordingly, the second statutory requirement for enforcement of the  
17 noncompetition covenant also is not satisfied. Wash. Rev. Code 49.62.020(b).

## 18 **B. Nonsolicitation Obligations**

19 Mr. Robins and Mr. Arthun argue that the nonsolicitation covenants in the  
20 Agreements are not enforceable subsequent to the enactment of Chapter 49.62  
21

1 because they do not fall within the statutory definition of “nonsolicitation  
2 agreement.” ECF No. 19 at 8.

3 The statute defines a “nonsolicitation agreement” as “an agreement between  
4 an employer and employee that prohibits solicitation by an employee, upon  
5 termination of employment: (a) Of any employee of the employer to leave the  
6 employer; or (b) of any customer of the employer to cease or reduce the extent to  
7 which it is doing business with the employer.” Wash. Rev. Code § 49.62.010(5). In  
8 comparison, a “noncompetition covenant” is defined to include “every written or  
9 oral covenant, agreement, or contract by which an employee or independent  
10 contractor is prohibited or restrained from engaging in a lawful profession, trade, or  
11 business of any kind.” Wash. Rev. Code § 49.62.010(4).

12 Although Washington courts previously considered a nonsolicitation covenant  
13 as “a type of covenant not to compete,” Chapter 49.62 now distinguishes the two.  
14 *Pac. Aerospace & Electronics, Inc. v. Taylor*, 295 F.Supp.2d 1205, 1215 (E.D.  
15 Wash. 2003). The definitions are provided to distinguish “nonsolicitation  
16 agreements” from “noncompetition covenants,” the latter of which now has express  
17 statutory requirements as a predicate to enforceability. Wash. Rev. Code. §  
18 49.62.020.

19 Here, section 4 of both Agreements set forth the following terms:

20 **4.1** During the Term and for one year after the end of the Term, I  
21 will not induce, or attempt to induce, any employee or independent  
contractor of neXus Surgical to cease such employment or relationship

1 to engage in, be employed by, perform services for, participate in the  
2 ownership, management, control or operation of, or otherwise be  
3 connected with, either directly or indirectly, any business that competes  
4 with neXus Surgical or NuVasive ("Competing Business").

5 **4.2** During the Term and for one year after the end of the Term, I  
6 will not represent, promote or otherwise try to sell within any territory  
7 I served for neXus Surgical any lines or products that, in neXus  
8 Surgical's reasonable judgment, compete with NuVasive Products or  
9 other products

10 represented by neXus Surgical within that territory and I will not solicit  
11 (directly or indirectly) any current or former customers of neXus  
12 Surgical or NuVasive to purchase any products or lines that, in neXus  
13 Surgical's reasonable judgment, compete with NuVasive Products or  
14 other

15 products represented by neXus Surgical within that territory. The one  
16 (1) year, post employment period during which the restrictions of this  
17 Section are applicable shall toll for any period of time in which I am  
18 not in compliance with my obligations.

19 ECF Nos. 21-1 at 4–5; 22-1 at 4–5. In other words, the Agreement prohibits Mr.  
20 Robins and Mr. Arthun from (1) inducing or attempting to induce any employee or  
21 contractor of neXus to cease such employment to work for a competitor; (2)  
representing, promoting, or otherwise trying to sell in the territory they served any  
lines or products that, in neXus' reasonable judgment, compete with NuVasive  
Products; and (3) soliciting (directly or indirectly) any current or former customers  
of neXus Surgical or NuVasive to purchase any products or lines that, in neXus'  
reasonable judgement, compete with NuVasive Products.

Whereas the first and third restraint fit within the definition of a  
“nonsolicitation agreement,” the second restraint effectively operates as a  
“noncompetition covenant.” The prohibition on the sale of competitor products is

1 not limited to former NuVasive or neXus surgeon-customers within the territories  
2 serviced by Mr. Robins and Mr. Arthun. By forbidding Mr. Robins and Mr. Arthun  
3 from selling a competitor's products within their previous sales territories, regardless  
4 of who the customer is, NuVasive and neXus are preventing the sales representatives  
5 from engaging in their profession within those previous sales territories. Wash. Rev.  
6 Code § 49.62.010(4); *see also Pac. Aerospace & Electronics, Inc.*, 295 F.Supp.2d at  
7 1216 (finding restrictive covenant reasonable because "it was a fair method for  
8 protecting the employer's customer base" that did not "wholly prevent" the former  
9 employee "from engaging in his profession."). Furthermore, there is an additional  
10 degree of subjective control reserved by NuVasive and neXus as to which "lines or  
11 products" are considered to be in competition with NuVasive products.

12 As written, the provision effectively operates as a noncompetition covenant  
13 and as such is subject to the statutory requirements of Wash. Rev. Code § 49.62.020.  
14 Accordingly, section 4.2 prohibiting the sale of competitor products within the sales  
15 territory previously serviced by Mr. Robins and Mr. Arthun on behalf of neXus is  
16 unenforceable in part for the same reasons discussed *supra* regarding the  
17 noncompetition covenants: failure to provide written notice of future enforcement  
18 and failure to meet the requisite salary level.

19 The Court will address the reasonableness of the remaining obligations and  
20 NuVasive and neXus' allegations that Mr. Robins and Mr. Arthun are violating the  
21 same *infra*.



1       **C. Reasonableness**

2       Even if the statutory requirements were satisfied, which the Court finds that  
3 they are not, the Court still must consider whether enforcing the restrictive  
4 covenants is reasonable. *A Place for Mom v. Perkins*, 2020 WL 4430997 at \*5. To  
5 decide whether a restrictive covenant is reasonable involves a consideration of three  
6 factors:

7           (1) whether restraint is necessary for the protection of the business or  
8           goodwill of the employer;

9           (2) whether it imposes upon the employee any greater restraint than is  
10          reasonably necessary to secure the employer's business or goodwill;  
11          and

12          (3) whether the degree of injury to the public is such loss of the service  
13          and skill of the employee as to warrant nonenforcement of the  
14          covenant.

15       *Emerick v. Cardiac Study Ctr., Inc., P.S.*, 357 P.3d 696, 701 (Wash. Ct. App. 2015).

16       Since the noncompetition covenants are unenforceable pursuant to Chapter 49.62,  
17 the Court focuses its analysis on the reasonableness of the nonsolicitation  
18 obligations. Specifically, the Court will analyze the reasonableness of Section 4.1,  
19 which precludes the sales representatives from inducing any employee or  
20 independent contractor of neXus to cease such employment, as well as Section 4.2,  
21 which precludes the sales representatives from soliciting current or former customers  
to purchase products that compete with NuVasive products. ECF No. 21-1 at 4–5,  
22-1 at 4–5.

1           **i. Necessity**

2           First, the Court considers whether the restraint is necessary to protect a party's  
3 business. *See id.* "Washington provides broad protection to tangible and intangible  
4 business interests and goodwill." *Amazon.com, Inc. v. Moyer*, 417 F. Supp. 3d 1388,  
5 1396 (W.D. Wash. 2019). "[T]he law in Washington is clear that an employer has a  
6 legitimate interest in protecting its existing client base and in prohibiting the  
7 employee from taking [its] clients." *Emerick*, 357 P.3d at 722 (internal citations and  
8 quotation marks omitted). Therefore, to show necessity, a party must demonstrate  
9 that a protectable interest exists, and that opposing party's actions could pose a  
10 threat to that interest if not adequately restrained. *See id.* at 723 ("It is the potential  
11 to compete—not the actual competition—that makes the noncompete necessary.").

12           NuVasive and neXus have demonstrated that protectable goodwill and  
13 business interests exist with respect to their existing surgeon-customers. NuVasive  
14 and neXus contend that the spinal hardware industry is highly competitive. Case  
15 No. 2:20-cv-331-RMP, ECF No. 1 at 3. Mr. Arthun's and Mr. Robin's new  
16 employer, Alphatec, is a direct competitor of NuVasive and neXus. *Id.* at 6. Due to  
17 the industry's highly competitive nature, Alphatec also purportedly requires its  
18 employees to sign noncompete agreements as a condition to employment. *Id.* at 3.  
19 Alphatec allegedly sells its products to a similar customer base, including surgeon-  
20 customers whom Mr. Robins and Mr. Arthun previously had supported on behalf of  
21 NuVasive as neXus. *Id.* at 7; Arthun Complaint at 10.

1 Mr. Robins and Mr. Arthun argue that because NuVasive is in the process of  
2 purchasing neXus, no restraint is necessary for the protection of the business or  
3 goodwill of the employer in this case, neXus. ECF Nos. 19 at 7; 25 at 7. The Court  
4 does not find this argument persuasive. The Agreements explicitly state that  
5 NuVasive has the authority to enforce its provisions as a third-party beneficiary to  
6 the Agreement. NeXus was an exclusive sales agent of NuVasive products in  
7 Washington, Montana, Utah, Wyoming, and Idaho. Robins Complaint at 2. To the  
8 extent that neXus has protectable interests, NuVasive shares those same interests in  
9 the sale of its products to customers in neXus' former sales region, notwithstanding  
10 neXus' dissolution as a separate entity.

11 Accordingly, the Court finds that there is a protectable business interest and  
12 that a nonsolicitation agreement is necessary to protect those interests.

### 13 **ii. Scope**

14 Second, the Court looks to whether the restraint is greater than reasonably  
15 necessary for the protection of the business or goodwill of the employer. *Emerick*,  
16 357 P.3d at 703. Specifically, the Court considers a covenant's geographic and  
17 temporal scope. *Id.*

18 With respect to a covenant's geographic scope, "[i]t is reasonable for the  
19 employer to preclude the employee from servicing those who were clients of the  
20 employer during the period of employment and for a period after the cessation of  
21 employment." *Id.* at 1063 (quoting *Perry v. Moran*, 748 P.2d 224, 229 (Wash.

1 1987)); *see also Seabury & Smith, Inc. v. Payne Fin. Grp., Inc.* 393 F.Supp.2d 1057,  
2 1062 (E.D. Wash. 2005) (upholding nonsolicitation covenant as reasonable because  
3 it was “limited in duration to the relatively short time period of one-year” and  
4 “reasonably limited in scope to Plaintiff’s clients who were solicited or serviced  
5 during employee’s term of service with Plaintiff.”).

6 Here, Section 4.2 is reasonable in scope as its restrictions on solicitation are  
7 limited to the sales territory that the employees serviced on behalf of NuVasive and  
8 neXus. ECF Nos. 21-1 at 4–5, 22-1 at 4–5.

9 However, with respect to soliciting current or former surgeon-customers,  
10 section 4.2 states:

11 I will not solicit (directly or indirectly) any current or former customers  
12 of neXus Surgical or NuVasive to purchase any products or lines that,  
13 in neXus Surgical’s reasonable judgment, compete with NuVasive  
Products or other products represented by neXus Surgical within that  
territory.

14 ECF No. 21-1 at 5, 22-1 at 5. As noted above, the Court finds that the ability of  
15 NuVasive and neXus to determine which products or lines in their “reasonable  
16 judgment” compete with NuVasive Products is an overbroad reservation of  
17 discretion. An employer’s unilateral decision as to which products a former  
18 employee may or may not sell or endorse is contrary to the purpose of the statute,  
19 which is to provide workplace mobility, especially if the determination is made only  
20 after the solicitation already occurred.

1 With respect to temporal scope, courts have found that restrictions with a  
2 duration of one-year are reasonable. *See Seabury & Smith, Inc.*, 393 F.Supp.2d at  
3 1062. In this case, the nonsolicitation restrictions extend for one year after the end  
4 of the employee's term of employment. ECF Nos. 21-1 at 4, 22-1 at 4. However,  
5 the Agreements state that the one-year period during which the restrictions are  
6 applicable "shall toll for any period of time in which the sales representative is not in  
7 compliance." ECF Nos. 21-1 at 5, 22-1 at 5. The tolling of the period of time that  
8 restrictions remain in effect is not per se unreasonable. *See Emerick*, 357 P.3d at  
9 706 (finding that court was within its equitable authority when it tolled the running  
10 of the restrictive covenant so former employee could not benefit from the expiration  
11 of the covenant due to pending litigation).<sup>1</sup>

12 Therefore, the Court finds that the nonsolicitation obligations found in  
13 Sections 4.1 and 4.2 impose a reasonable restraint on former employers.  
14

---

15 <sup>1</sup> Under Washington's new non-compete law, a noncompetition covenant with a  
16 duration exceeding eighteen months is presumptively unreasonable and  
17 unenforceable. Wash. Rev. Code § 49.62.020(2). To rebut this presumption, a  
18 party seeking enforcement must prove by clear and convincing evidence that a  
19 duration longer than eighteen months is necessary to protect the party's business or  
20 goodwill. *Id.* The Court notes that the restrictions on their face do not exceed  
21 eighteen months in duration but, with tolling, there is a possibility that an  
employee would be subject to the restrictions for more than eighteen months. The  
statute does not address whether the presumption of unreasonableness would be  
triggered if a noncompetition covenant exceeded eighteen months due to tolling.

1        **iii. Public Policy**

2            Third, courts consider whether enforcement of the covenant creates a  
3 possibility of harm to the public, balanced against the employer’s right to protect its  
4 business. *Emerick*, 357 P.3d at 705. “Such harm may include restraint of trade,  
5 limits on employment opportunities, and denial of public access to necessary  
6 services.” *Id.* Neither party raises the issue of harm to the public nor is the Court  
7 aware of a risk of harm to the public that would be created by enforcing the  
8 nonsolicitation covenants.

9        **2. Mr. Robins’ & Mr. Arthun’s Potential Breach of Restrictive Covenants**

10            Having addressed the issues with enforceability, the Court next considers  
11 whether NuVasive and neXus have made a “clear showing” of the likelihood that  
12 Mr. Robins and Mr. Arthun breached the nonsolicitation covenants.

13            With respect to Section 4.1, which prohibits inducing another employee to  
14 cease their relationship with neXus and become employed with a competing  
15 business, there is no evidence that either Mr. Robins or Mr. Arthun induced or  
16 attempted to induce other neXus employees to join Alphatec. Mr. Michael  
17 Marquardt, a Spine Specialist for NuVasive/neXus, explored the possibility of  
18 employment with Alphatec in the summer of 2020; however, Mr. Marquardt asserts  
19 that Mr. Robins played no role in that process. ECF No. 25-3 at 4.

20            Section 4.2 prohibits an employee from directly or indirectly soliciting current  
21 or former customers of neXus to purchase a competitor’s products. ECF No. 21-1 at

1 4–5, 22-1 at 4–5. NuVasive and neXus maintain that because “sales representatives  
2 in the spine industry solicit their surgeon-customers on a near daily basis,” Mr.  
3 Robins and Mr. Arthun are in breach of this provision by nature of their employment  
4 with Alphatec. ECF No. 25 at 9. Mr. Robins and Mr. Arthun argue that there is no  
5 evidence that they solicited any current or former NuVasive or neXus surgeon-  
6 customers to stop using NuVasive products. ECF No. 8–9. Furthermore, they  
7 contend that the surgeon-customers identified in the record independently decided to  
8 discontinue or reduce their use of NuVasive products without Mr. Robins’ or Mr.  
9 Arthun’s knowledge or involvement and prior to their leaving employment with  
10 NuVasive. ECF Nos. 19 at 4; 21 at 8–10; 22 at 12–13.

11 **Mr. Robins**

12 NuVasive and neXus allege that Mr. Robins supported a surgery on behalf of  
13 Alphatec performed on June 4, 2020, by Mr. Robins’ primary neXus/NuVasive  
14 surgeon-customer, Dr. Dan Blizzard. Robins Complaint at 7. Mr. Robins contends  
15 that in May of 2020, Dr. Blizzard had decided to transition to the use of Alphatec  
16 products based upon communications with other surgeons, and informed Mr. Robins  
17 of the same. ECF No. 22 at 12. Dr. Tohmeh allegedly began to use fewer NuVasive  
18 products in 2019. *Id.* Both Drs. Blizzard and Tohmeh allegedly urged Mr. Robins  
19 to consider employment with Alphatec. *Id.* at 13–14. Since Mr. Robins was on a  
20 commission-based salary, and these surgeons were his primary customers, there was  
21 a financial incentive to seek employment with Alphatec. *Id.* at 14.

1 Mr. Robins separated from neXus on May 31, 2020 and immediately began  
2 working for Alphatec. Case No. 2:20-cv-331-RMP, ECF No. 1-3. Mr. Robins  
3 acknowledged that his Alphatec territory includes two former NuVasive/neXus  
4 surgeon-customers, Drs. Dan Blizzard and Tony Tohmeh. *Id.* However, these  
5 surgeons allegedly elected to use Alphatec products prior to Mr. Robins'  
6 employment with the company. *Id.*

7 **Mr. Arthun**

8 NuVasive and neXus allege that Mr. Arthun was supporting surgeries and  
9 soliciting surgeon-customer, Dr. Ben Smith, on behalf of Alphatec. Arthun  
10 Complaint at 10. Mr. Robins contends that in May of 2020 Dr. Smith had made the  
11 decision to transition to the use of Alphatec products and informed Mr. Arthun of  
12 the same. ECF No. 21 at 8–9. Mr. Arthun allegedly accepted an employment offer  
13 from Alphatec on June 16, 2020, and separated from neXus on June 21, 2020.  
14 Arthun Complaint at 8.

15 NuVasive and neXus do not provide any evidence to contradict that these  
16 surgeons' decisions to switch to Alphatec products was independent and not at the  
17 request of either Mr. Robins or Mr. Arthun. Furthermore, based on the potential  
18 commissions associated with these surgeon-customers, it is likely that Mr. Robins  
19 and Mr. Arthun were motivated to switch employers as a result of the surgeons'  
20 choice, rather than vice versa.



1        Aside from the allegations related to the aforementioned surgeon-customers,  
2 NuVasive and neXus do not provide evidence that Mr. Robins and Mr. Arthun have  
3 violated the restrictive covenants of their agreements other than broadly concluding  
4 that the sales representative cannot perform their job for Alphatec without soliciting  
5 NuVasive/neXus surgeon-customers. ECF Nos. 17-1 at 4, 25-2 at 5–6. There is not  
6 a sufficient showing before the Court that this conclusion as applied to Mr. Robins  
7 and Mr. Arthun is true.

8        NuVasive and neXus also fail to specify any other surgeon-customers whose  
9 business NuVasive and neXus allegedly have lost as a result of Mr. Robins’ and Mr.  
10 Arthun’s efforts on behalf Alphatec. *Contra A Place for Mom*, 2020 WL 4430997 at  
11 \*7 (finding that Plaintiff had demonstrated serious questions on the merits of breach  
12 of contract claim with “evidence that it has in fact lost at least one referral source  
13 and that Defendant solicited at least 20 more.”). Rather, NuVasive and neXus claim  
14 that “Alphatec’s raid on neXus’ sales personnel negatively impacted its business and  
15 its corporate valuation.” ECF No. 25-2 at 5. Alphatec is not a defendant to this  
16 action and their alleged “raid” is not material to whether Mr. Robins or Mr. Arthun  
17 are soliciting current or former surgeon-customers.

18        NuVasive and neXus claim that “[i]t is laughable to even suggest that the  
19 Sales Reps . . . do not regularly solicit surgeons and/or medical facilities.” However,  
20 two other former neXus sales professionals, Chad Marshall and Brian Sandilands,  
21 were hired by Alphatec in late 2020. ECF No. 25-2 at 5. NuVasive and neXus did

1 not bring suit against Mr. Marshall and Mr. Sandilands, “because to  
2 [NuVasive’s/neXus’] knowledge, they are complying with their restrictive  
3 covenants.” *Id.* Assuming those sales representatives signed the same Agreement as  
4 Mr. Robins and Mr. Arthun, and are performing similar duties on behalf of  
5 Alphatec, the only way in which Mr. Marshall and Mr. Sandilands are complying  
6 with their restrictive covenants, and Mr. Robins and Mr. Arthun are not, is if they  
7 are in a different sales territory than that which they serviced on behalf of NuVasive  
8 and neXus. Therefore, the Court finds that NuVasive and neXus have not  
9 demonstrated a likelihood of success as to their claim that Mr. Robins and Mr.  
10 Arthun breached the nonsolicitation provisions of their respective Agreements.

## 11 **II. Irreparable Harm**

12 NuVasive and neXus claim they have and will continue to suffer irreparable  
13 harm because Mr. Robins and Mr. Arthun are actively soliciting the business of  
14 NuVasive and neXus surgeon-customers on behalf of their competitor, Alphatec.  
15 ECF No 6-1 at 13.

16 In order to obtain a preliminary injunction, a party must establish that  
17 irreparable harm is likely. *Winter*, 555 U.S. at 22. Irreparable harm is defined as  
18 harm for which there is no adequate legal remedy, such as an award of damages.  
19 *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 994 F.2d 597, 603  
20 (9th Cir. 1991). Evidence of “threatened loss of prospective customers or goodwill .  
21 . . supports a finding of the [likelihood] of irreparable harm.” *Stuhlbarg Intern Sales*

1 *Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001).  
2 Customer goodwill “relates to the positive reputation, public confidence in, and  
3 customer loyalty to, an individual business entity.” *True Organic Products, Inc v.*  
4 *Cal. Organic Fertilizers Inc.*, 2019 WL 1023888 at \*5 (E.D. Cal. March 4, 2019)  
5 (citation omitted).

6 The Court finds that NuVasive and neXus have failed to show a likelihood of  
7 irreparable harm for three reasons. First, there is no evidence that demonstrates that  
8 NuVasive and neXus have lost surgeon-customers and associated “good will”  
9 because of Mr. Robins and Mr. Arthun. Although NuVasive and neXus argue that it  
10 will not be able to regain the business of those surgeons identified in the record  
11 absent an injunction prohibiting Mr. Robins and Mr. Arthun from working with  
12 these surgeons for one year, NuVasive and neXus have failed to proffer evidence  
13 showing that the loss of the former surgeon-customers’ business was not already lost  
14 prior to Mr. Robins’ and Mr. Arthun’s separation. ECF No. 17-1 at 3–4. In other  
15 words, NuVasive and neXus have failed to show that the irreparable harm they now  
16 allege actually was caused by Mr. Robins and Mr. Arthun, and not just a result of a  
17 superior product or the competitive nature of the industry.

18 Second, a finding of irreparable harm based on future losses of surgeon-  
19 customers is wholly speculative. NuVasive and neXus argue that the chances they  
20 lose the business of other surgeons within Mr. Robins’ and Mr. Arthun’s former  
21 sales territories increases if the sales representatives are not required to comply with

1 their noncompetition and nonsolicitation obligations. *Id.* at 4. However, because  
2 NuVasive and neXus failed to provide evidence showing causation between the loss  
3 of the identified surgeons and any actions by Mr. Robins or Mr. Arthun, the  
4 conclusion that they will lose the business of other surgeons absent an injunction is  
5 wholly speculative. *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668,  
6 674 (9th Cir.1988) (“Speculative injury does not constitute irreparable injury  
7 sufficient to warrant granting a preliminary injunction.”). There is a lack of  
8 evidence in the record to support such speculation.

9 Finally, the alleged loss of business is readily compensable by monetary  
10 damages. *Amylin Pharm., Inc. v. Eli Lilly & Co.*, 456 F. App'x 676, 678 (9th Cir.  
11 2011) (“[L]ost profits due to lost sales generally constitutes the type of harm that is  
12 fully compensable through money damages and therefore does not support  
13 injunctive relief.”). Additionally, there is no evidence that Mr. Robins’ and Mr.  
14 Arthun’s actions threaten to put NuVasive out of business. *See Los Angeles*  
15 *Memorial Coliseum Comm’n*, 634 F.2d 1197, 1203 (9th Cir. 1980). Although  
16 NuVasive and neXus claim that “Alphatec’s raid on neXus’ sales personnel  
17 negatively impacted [NuVasive’s] business and its corporate valuation,” Alphatec is  
18 not a defendant to this action and their alleged “raid” is not material as to whether  
19 Mr. Robins or Mr. Arthun have caused or will cause NuVasive and neXus to suffer  
20 “irreparable harm.” ECF No. 25-2.

1 Therefore, the Court finds that NuVasive and neXus have failed to make a  
2 “clear showing” of the likelihood that it will suffer irreparable injury absent a  
3 preliminary injunction.

### 4 **III. Balance of Equities**

5 NuVasive and neXus argue that the balance of equities tip in their favor  
6 because absent an injunction, they will “forever lose the benefit of the Agreements’  
7 bargain . . . as they will not be permitted the appropriate time period to reestablish  
8 their relationships with [ ] former surgeon-customers.” ECF No. 18 at 11.

9 To balance the hardships, the Court must “identify the possible harm caused  
10 by the [injunction] against the possibility of harm caused by not issuing it.” *Univ. of*  
11 *Hawai’I Prof. Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999). Where  
12 there are “serious questions” on the merits, the balance of hardships must tip sharply  
13 in the moving party’s favor and the other factors must be satisfied for a preliminary  
14 injunction to be issued. *See Short*, 893 F.3d at 675.

15 It is unlikely that Mr. Robins and Mr. Arthun will suffer any harm from an  
16 injunction prohibiting the solicitation of their former NuVasive/neXus surgeon-  
17 customers, especially where the record indicates they already are complying with the  
18 nonsolicitation obligations. However, the purported harm identified by NuVasive  
19 and neXus if an injunction is not issued, specifically the inability to regain the three  
20 former-surgeon customers’ business, is not persuasive. The record indicates that this  
21 business was lost prior to Mr. Arthun’s and Mr. Robins’ separation from neXus.

1 Injunctive relief is not an appropriate remedy for harm caused by the nature of a  
2 market as opposed to harm caused by the intentional actions of a market participant.  
3 Accordingly, NuVasive and neXus have not demonstrated that the balance of  
4 equities tip sharply in their favor.

#### 5 **IV. Public Policy**

6 Finally, the Court analyzes whether a preliminary injunction serves the public  
7 interest. NuVasive and neXus argue that the public interest is benefited by the  
8 proper enforcement of restrictive covenants. ECF No. 18 at 12. The Court finds that  
9 the record is incomplete to support whether public interest is meaningfully  
10 implicated by this dispute. To the extent that the public interest is implicated,  
11 however, it favors workforce mobility which “is important to economic growth and  
12 development.” Wash. Rev. Code § 49.62.005.

#### 13 **V. Conclusion**

14 Upon considering the likelihood of success on the merits, irreparable harm,  
15 the balance of equities, and the public interest, the Court finds that NuVasive and  
16 neXus have not made a “clear showing” that demands an “extraordinary and drastic  
17 remedy” of a preliminary injunction. *Mazurek v. Armstrong*, 520 U.S. 968, 972  
18 (1997).

19 Accordingly, **IT IS HEREBY ORDERED:**

20 1. NuVasive, Inc. & NeXus Surgical Innovation, Inc.’s Motion for  
21 Preliminary Injunction Against Matt Robins **ECF No. 14**, is **DENIED**.

2. NuVasive, Inc. & NeXus Surgical Innovation, Inc.’s Motion for Preliminary Injunction Against Ronald V. Arthun, **ECF No. 17**, is **DENIED**.

**IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order and provide copies to counsel.

**DATED** December 3, 2020.

*s/ Rosanna Malouf Peterson*  
 ROSANNA MALOUF PETERSON  
 United States District Judge